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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KATE MCLELLAN, TERESA BLACK, DAVID URBAN, ROB DUNN, RACHEL SAITO, TODD RUBINSTEIN, RHONDA CALLAN, JAMES SCHORR, BRUCE MORGAN, and AMBER JONES, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

FITBIT, INC.,

Defendant.

JUDITH LANDERS, LISA MARIE BURKE, and JOHN MOLENSTRA, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

FITBIT, INC.,

Defendant.

Case Nos. 16-cv-00036-JD; 16-cv-00777-JD

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO MOTION TO STRIKE CLASS ALLEGATIONS

Date: May 31, 2018
Time: 10:00 a.m.
Ctrm: 11, 19th Floor

The Honorable James Donato

Plaintiff Dunn submits this Sur-Reply in Opposition to Fitbit's Motion to Strike Class Allegations (Dkt. 129). A new material fact has emerged that directly affects Plaintiff's opposition arguments and calls into question the due process and fundamental fairness of the arbitration procedure that Fitbit is attempting to impose on the non-opt-out Plaintiffs.

For the last two years, Fitbit argued that because its Terms of Service incorporated a "delegation clause" only an arbitrator—and not this Court—could review the non-opt-out Plaintiffs' challenges to the applicability and enforceability of the arbitration clause and class action waiver. *See, e.g.*, Dkt. 57 at 3 ("[T]he arbitrability of Plaintiffs' claims in this case must be decided by an arbitrator."); *id.* at 8 ("The Court should refer the parties to the AAA to decide whether the arbitration clause is to be enforced."); Dkt. 62 at 10 ("The Court should refer the parties to the AAA to decide whether the arbitration clause is to be enforced."); Dkt. 88 at 5 ("[T]he parties agreed that arbitrability is for the arbitrator, not a court."); Dkt. 94 at 7 ("The parties have clearly and unmistakably delegated all issues of arbitrability to an arbitrator. The Court should refer the parties to the AAA to decide whether the arbitration clause is to be enforced . . . ."); Dkt. 118 at 3 ("[T]he arbitrator" must consider whether a "provision [that] purports to waive" a plaintiff's "right to seek public injunctive relief in all fora" renders the arbitration provision unenforceable) (citation omitted); Dkt. 134 at 3 ("The arbitrator must decide the arbitrability" of any claim brought by a non-opt out plaintiff). This Court agreed, holding that the non-opt-out Plaintiffs' arguments that "Fitbit procured the agreement to arbitrate by fraud" and that "the arbitration provision is unenforceable as applied to plaintiffs' claims for public injunctive relief . . . *must be considered by the AAA arbitrator* in the first instance," and that "the arbitrator *will resolve* [the non-opt-out] plaintiffs' challenges to the scope and enforceability of the arbitration clause." Dkt. 114 at 8-9 (emphasis added).

One non-opt-out Plaintiff, Kate McLellan, initiated an arbitration seeking a determination on precisely the arbitrability issues that the Court concluded must be determined by an arbitrator. *See* Dkt. 133 at 5; *id.*, Ex. A (noting that Ms. McLellan would "contest[] the scope and enforceability of the arbitration agreement"). If the arbitrator determines that the arbitration clause and class action waiver are not enforceable or applicable to the proposed class claims—an

issue that is identical for all non-opt-out Plaintiffs and unnamed class members—Fitbit's motion to strike the class allegations will be moot.[1] Thus, Plaintiff Dunn argued in his opposition that, while the arbitrator's decision on arbitrability is still pending, Fitbit's motion was premature.

Now, in an about-face and a transparent effort to nullify Plaintiff Dunn's "prematurity" argument, Fitbit has acted to deprive Ms. McLellan of *any opportunity* to resolve her arbitrability challenges in *any forum*, including in arbitration. After Ms. McLellan filed her arbitration demand, Fitbit made her a settlement offer. *See* Ex. A, Attachments 1-2. She declined the offer, explaining that, pursuant to this Court's order, she intended to enforce her right to have an arbitrator determine "(1) whether the arbitration clause and class action waiver are enforceable and/or applicable to her claims, and (2) whether she can bring a claim for public injunctive relief on behalf of all members of the proposed class." *Id.*, Attachment 3. Fitbit then informed the arbitrator that it "regard[ed] this matter as concluded" and refused to pay the arbitration fees as required under the Terms of Service, notwithstanding the fact that Ms. McLellan had properly initiated arbitration and rejected Fitbit's settlement offer. *Id.* at 2. In other words, Fitbit is now refusing to engage in the arbitration it sought to compel for nearly two years.

Fitbit's actions lay bare its strategy to use arbitration to deprive its consumers of even a modicum of due process. No authority permits a party to use a delegation clause to deny a party any opportunity to be heard. Yet this is exactly what Fitbit has done, and in so doing, it has undermined this Court's order that the non-opt-out Plaintiffs' arbitrability defenses "must be considered by the AAA arbitrator." Dkt. 114 at 8.

This conduct further supports Plaintiff Dunn's opposition to the motion to strike. It also constitutes a "new material fact" supporting a motion for reconsideration of the initial arbitration order. *See* Civ. L.R. 7-9. To avoid unnecessary filings with respect to the latter, however, Plaintiffs' counsel will be prepared to address the matter with the Court at the upcoming hearing before taking further action.

[1] In its Reply, Fitbit takes the illogical and impractical position that even if an arbitrator decides that the arbitration clause is unenforceable on grounds applicable to all, each of the potentially millions of consumers must obtain the same order in individual arbitration before they can become absent class members in Mr. Dunn's proposed class action. Dkt. 134 at 4-5.

Respectfully submitted,

Dated: May 22, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2018, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ Jonathan D. Selbin
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